

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT DAVIS,

Plaintiff/Counterdefendant-
Appellant,

v

DEBRA J. HUMPHREY,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED
February 21, 2012

No. 301405
Wayne Circuit Court
LC No. 10-007095-AW

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Plaintiff Robert Davis appeals as of right from the order of the Wayne Circuit Court denying his motion for summary disposition under MCR 2.116(C)(7) on the counterclaim of defendant Debra J. Humphrey. We affirm.

Davis was a member of the Highland Park Board of Education (“the Board”) until his term expired on June 30, 2010. Although Davis ran for reelection on May 4, 2010, two other candidates, Humphrey and Clifford Chatman, received more votes than Davis and, thus, were elected to the Board. After the election, Davis filed a complaint against Humphrey alleging that her election to the Board was void and requesting a writ of quo warranto. On July 15, 2010, Humphrey answered Davis’s complaint and also brought a counterclaim against him for defamation, intentional infliction of emotional distress, and abuse of process. The trial court dismissed Davis’s complaint on July 23, 2010, but Humphrey’s counterclaim remained. Davis, in propria persona, filed an answer and affirmative defenses to Humphrey’s counterclaim on August 4, 2010; Davis asserted governmental immunity as an affirmative defense.¹ On September 23, 2010, Davis moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). Davis argued that he was entitled to summary disposition under MCR 2.116(C)(7)

¹ The register of actions does not indicate that Davis filed an answer and affirmative defenses to the counterclaim, although the lower court record contains two copies of the document, date-stamped August 4, 2010, each with a different type of date-stamp.

because he had governmental immunity as a member of the Board. In response to the motion, Humphrey argued that Davis was not entitled to summary disposition under MCR 2.116(C)(7) because he failed to properly assert the affirmative defense of governmental immunity as she was never served with Davis's answer and affirmative defenses. The trial court agreed and denied Davis's motion for summary disposition under MCR 2.116(C)(7), opining, in part, as follows:

Okay, [Humphrey] is correct that governmental immunity is an affirmative defense when it goes to employees. . . . Here [Humphrey] argues that [Davis] never answered the counter complaint. The register of actions in my computer does not show one, but I have one stamped and submitted attached to their pleadings.

* * *

The answer to the counter complaint was never served.

* * *

For purposes of whether or not this motion is to be granted, the Court is satisfied that (c) (7) be denied.²

The only issue before this Court is whether the trial court erroneously denied Davis's motion for summary disposition under MCR 2.116(C)(7).

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity. See *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011). Generally, "[w]hen reviewing a motion for summary disposition under MCR 2.116(C)(7), all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties." *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Id.*

Davis argues that the trial court erred in denying his motion for summary disposition because he was entitled to governmental immunity as a member of the Board. The trial court, however, did not determine whether Davis was entitled to governmental immunity. Rather, the trial court denied the motion on the ground that Davis failed to properly assert governmental immunity as an affirmative defense.

² Although not at issue in this appeal, the trial court also denied Davis's motion for summary disposition under both MCR 2.116(C)(8) and (C)(10), concluding that Humphrey did not fail to state her tort claims and that Davis's (C)(10) motion was premature because discovery was ongoing.

“Sovereign immunity as it applied to the king in English common law and statutorily created governmental immunity that is currently applicable to the state as a sovereign government are ‘characteristic[s] of government.’” *Odom v Wayne Co*, 482 Mich 459, 478; 760 NW2d 217 (2008), quoting *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). Thus, a unit of government cannot waive governmental immunity because it is not an affirmative defense, and “a party suing a unit of government must plead in avoidance of governmental immunity.” *Mack*, 467 Mich at 197-203. In contrast, governmental immunity for individuals is an affirmative defense. *Odom*, 482 Mich at 479; see also MCR 2.111(F)(3)(a). “[T]he burden . . . fall[s] on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense.” *Odom*, 482 Mich at 479. And, because it is an affirmative defense, governmental immunity for individuals may be waived. See *Mack*, 467 Mich at 197-203 (a unit of government cannot waive governmental immunity because it is not an affirmative defense); *Odom*, 482 Mich at 479 (governmental immunity for individuals is an affirmative defense).

“A party served with a pleading stating a . . . counterclaim against that party must *serve* and file an answer or take other action permitted by law or [the Michigan Rules of Court] within 21 days after service.” MCR 2.108(A)(4)(emphasis added). “A motion raising a defense . . . to a pleading must be *served* and filed within the time for filing the responsive pleading” MCR 2.108(B)(emphasis added). Furthermore, a party against whom a counterclaim has been alleged must assert his or her defenses in a responsive pleading. MCR 2.111(F)(2)-(3). Generally, “[a] defense not asserted in the responsive pleading or by motion as provided by [the Michigan Rules of Court] is waived” MCR 2.111(F)(2).³ “[A] party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed.” MCR 2.111(F)(2)(a).

Here, Davis filed an answer and affirmative defenses, including governmental immunity, to the counterclaim. But, there is no proof in the record that he served the answer and affirmative defenses on Humphrey as required by MCR 2.108(A)(4). Davis did not file and serve his motion for summary disposition on the basis of governmental immunity within 21 days after he was served with Humphrey’s counterclaim. Therefore, Davis waived the affirmative defense of governmental immunity. See MCR 2.111(F)(2). The trial court did not err when it denied Davis’s motion for summary disposition under MCR 2.116(C)(7).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering

³ Exceptions to the general rule of waiver include a lack of subject matter jurisdiction and failure to state a claim. MCR 2.111(F)(2)